United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-2176

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FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL UNION NO. 305, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by refusing employees Anthony DiMella and Victor Bartolucci referrals through its exclusive hiring hall because of their lack of membership in the Union.

2. Whether the Board's order is within its broad discretion to fashion appropriate relief to expunge the effects of practices found unlawful.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued on June 21, 1974, against Local Union No. 305, Plumbers, and Pipefitters (the "Union"). The Board's Decision and Order (A. 2-25)[1] is reported at 211 NLRB No. 124. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in and around New London, Connecticut, where the Union has its principal office.

I. THE BOARD'S FINDINGS OF FACT

A. Background

1. The contractual hiring hall

The Union represents steamfitters, plumbers, and pipefitters in the New London, Connecticut area (A. 7; 33-34). Pursuant to a series of contracts, signatory mechanical contractors in the New London area, have delegated all hiring authority to the Union. Accordingly the Union operates an exclusive hiring hall in this geographical area for these craft employees (A. 7-8; 274-279). The most recent contract requires the Union

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[1] "A." references are to the printed Appendix. References preceding a semicolon are to the Board's findings and those succeeding a semicolon are to the supporting evidence.

to maintain a registration list for qualified job applicants who are to be referred "on a first in, first out basis" without regard to "any . . . aspect or obligation of union membership, policies, or requirements" (A. 8; 276-277). The contract authorizes the signatory contractors to employ only qualified plumbers and steamfitters – *i.e.*, those registrants "who had at least five years' actual practical working experience at the Plumbing or Heating trade as a journeyman or apprentice in the building and construction industry . . ." (A. 8; 275). The contract also empowers a Joint Hiring Committee, *inter alia*, to conduct competency and skill examinations "for qualifying journeymen" (A. 8; 278-279). At all relevant times Anthony J. Impellitteri, business manager of the Union, was responsible for the referral of job applicants through the exclusive hiring hall (A. 9; 32-33).

2. The Union refers local applicants DiMella and Bartolucci to jobs with New London area contractors except when current Union members are also available for work

In September 1969, applicant Anthony DiMella telephoned Union Vice-President Anthony Polcaro and asked him for a job (A. 9; 116, 148). Polcaro asked him "what [he] knew about pipe?" (A. 9; 116, 148). DiMella said that he had worked for General Dynamics Corporation for 12 years rigging pipe systems on ships (A. 9; 115-116, 132-133). Polcaro then said he would "have to clear it through the [Union Business Agent] first" (A. 9; 116, 148, 225). Union business manager Anthony Impellitteri cleared the referral and Polcaro then telephoned DiMella and told him to report to Ebasco on the Millstone One job (A. 9; 116, 147-148, 61). DiMella worked at this site rigging pipe and performing some pipefitting work until October 1970 when he was laid off for lack of work (A. 9; 116-119, 148). Shortly thereafter, DiMella contacted Anthony Impellitteri,

on Polcaro's instruction, and asked him for another job assignment (A. 9; 120-121). Impellitteri replied: "Well, I have book men right now who are out but I will take care of it" (A. 9; 121). About a week later Impellitteri dispatched DiMella to a W.J. Barney jobsite where he worked as a pipefitter paired with a welder until October 1971, when he was laid off for lack of work (A. 9; 120-124, 149-150). DiMella immediately telephoned Impellitteri and asked him "have you got anything" (A. 9; 123-124). A week later Impellitteri told DiMella: "Right now, things don't look too good. I have a lot of book men out, but I'll take care of you. Don't worry" (A. 9-10; 124). In November 1971, Impellitteri dispatched DiMella to the Bechtel job at the Millstone Two job where he worked as a pipefitter until March 1972 when he was laid off for lack of work (A. 10; 124-127). DiMella again telephoned Impellitteri at home about available work. Impellitteri said: "Tony, I've got a lot of book men out and I will take care of you. Don't worry about it" (A. 10; 127). For five months thereafter, Impellitteri repeatedly told DiMella: "I've also got book men out and they come first" (A. 10, 11; 128-129). Finally, in September 1972, Impellitteri ultimately agreed to refer DiMella to the Ebasco job, where he worked as a pipefitter until January 5, 1973, when he was laid off for lack of work (A. 11; 128-132, 152-153). During January DiMella telephoned Impellitteri four times and requested work. Each time Impellitteri told him he had book men out and half the State of Connecticut on his back and he would try to take care of him (A. 11; 134-135). DiMella did not obtain another job referral from Impellitteri.

In mid-August 1969, applicant Victor Bartolucci telephoned Impellitteri, whom he had known socially for a number of years, to ask for a job (A. 12; 167-168). Impellitteri referred Bartolucci to the night shift at the Millstone One job although Impellitteri "knew that he did not have experience at all" (A. 12; 167-169, 220-221, 66, 76-76). This

night work, involving pipe rigging and some pipefitting, continued until February 1970, when Bartolucci was terminated by the contractor for lack of work (A. 12; 168-169). Thereafter, between March 1970 and July 1971, Impellitteri referred Bartolucci to three different contractors following the completion of each particular job. On these jobsites, as in the first instance, Bartolucci worked as a pipefitter (A. 12-13; 169-175). In late July when Bartolucci requested another referral, Impellitteri told him: "Right now its a little tight, kid, but hang on. We've got a few book men we've got to take care of. We've got to place them" (A. 13; 175-176). Thereafter, Bartolucci obtained two referrals from Impellitteri for work as a pipefitter (A. 13; 175-179). After the second layoff in March 1972, Bartolucci again went to the Union hall where Impellitteri told him that "things were a little tight", that he had "some book men out of work" (A. 13; 180). In May 1972, Impellitteri referred Bartolucci to the Groton Submarine Base where he worked for six weeks paired with a welder performing pipefitting work (A. 13; 180-182). Bartolucci was unable to obtain another referral from Impellitteri until September 1972, when he was sent to work for Ebasco at Millstone One (A. 13; 182). This job, involving general pipefitting work, terminated on January 5, 1973, for lack of work (A. 13; 182-183). Beginning in mid-January and continuing until March 1973, Impellitteri repeatedly told Bartolucci: "It's like this kid, I've got some book men out of work, as soon as there is a spot, you've got it" (A. 14; 183). Bartolucci did not obtain another job referral from Impellitteri.

B. The Union refuses to refer DiMella and Bartolucci because current Union members were also available for employment and because other Union business agents were seeking work within the Union's jurisdiction for their unemployed members

Beginning sometime in February 1973, Bartolucci and DiMella made frequent visits together to the Union hall to request job referrals (A. 11; 14-15, 135-136, 153, 183-184). On each of these visits, Impellitteri refused them employment, saying: "I've got book men out. They come first" (A. 11, 14-15; 136-137, 184, 199-200). On at least one occasion, Impellitteri told Bartolucci and DiMella: "As soon as I can get the BAs [business agents] from the rest of the state off my back I will take care of you" (A. 11, 14; 136-137, 184, 209). Impellitteri also told them that he considered them good workers who did not lose any worktime, and he had never had any complaint from any foreman they had worked for, adding: "If and when I can put permit [*i.e.*, non-members of Local 305] men to work, you will be first" (A. 11, 14-15; 184, 55-56, 67). This promise remained unfullfilled except that in April 1973, DiMella, with Polcaro's assistance, obtained a referral as a gasfitter from Assistant Business Agent Terrance Quinn (A. 12; 138-139).[2] This job lasted until June 1973 (A. 12; 139). Bartolucci obtained no work other than a one week referral from Quinn as a gasfitter in May 1973 (A. 14 n. 10; 185-186). In July and early August, both men made further requests for jobs from Impellitteri who repeatedly told them that "things were real bad, that he was getting more and more pressure from BAs throughout the state, that he was very fortunate that they had the work and outside the state didn't", and "I have book men out" (A. 14; 140-141, 189-190).

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[2] Quinn is solely responsible for the referral of "gasfitters", an entirely separate craft which came within the Union's jurisdiction by merger in January 1973 (A. 235-236; 34-35, 67, 83). The Board erroneously stated (A. 12) that it was Impellitteri, rather than Polcaro, who told DiMella to call Quinn.

In late July or early August, 1973, DiMella and Bartolucci learned for the first time that the Union was supposed to maintain a job referral list (A. 15; 144, 145, 233-234). Accordingly, on August 6, 1973, they went to the Union hall and asked Quinn, in Impellitteri's absence, if they could sign the out of work list (A. 15; 142, 186, 188-189). Quinn offered no objection and produced a list of names for their signatures (A. 15; 280-283). Shortly thereafter, Impellitteri arrived and after DiMella and Bartolluci left the Union hall, he drew a line through their signatures, allegedly because they did not possess the requisite qualifications to sign the list (A. 15 n. 12; 144, 47-49). About this same time DiMella and Bartolucci also submitted applications for membership in the Union (A. 15-16; 189-190). At the time of the hearing these applications had not been accepted since in Impellitteri's opinion neither applicant had the five years experience as a pipefitter necessary for admission to Union membership (A. 16; 84). On August 7 and August 13, 1973 respectively, DiMella and Bartolucci filed the unfair labor practice charges upon which this case is based (A. 6 n. 2; 272-273).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found, in agreement with the Administrative Law Judge, that the Union violated Section 8(b)(1)(A) of the Act by denying job referrals to applicants Anthony DiMella and Victor Bartolucci because of "their lack of membership in the Union" (A. 2-3, 19).

Because the Union's violations "go to the very heart of the Act," the Board's order requires the Union to cease and desist from the unfair labor practices found and from "in any other manner restraining or coercing employees or applicants for employment in the exercise of rights

guaranteed by Section 7 of the Act" (A. 3, 21). Affirmatively, the order requires the Union to make DiMella and Bartolucci whole for any loss of pay resulting from the Union's unfair labor practices, to preserve and make available to the Board upon request any referral and backpay records or documents which are useful or appropriate in determining compliance, and to "maintain permanent written records of its hiring and referral operations which will be adequate to disclose fully the basis upon which referrals are made" and to make such records available to the Board upon request (A. 3; 21-22). The order further requires the Union to post appropriate notices "at its business office, hiring hall and meeting rooms", and to "sign and mail" a sufficient number of notices to the Board's Regional Director for posting by willing employers party to the Union's collective bargaining agreement (A. 3, 22).[3]

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) BY DENYING DIMELLA AND BARTOLUCCI JOB REFERRALS BECAUSE THEY WERE NOT MEMBERS OF THE UNION

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7. . . ." Section 7 confers upon employees "the right to refrain from any or all" union membership activities. It is well-settled that Section 8(b)(1)(A) bars a labor organization from denying job applicants access to an exclusive hiring hall which the union administers

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[3] The Board in the absence of exceptions adopted *pro forma* the Judge's ruling that the Union's failure to maintain adequate records of its referral operations did not constitute an independent violation of Section 8(b)(1)(A) of the Act (A. 3 n. 2).

as the employer's hiring agent if the union's conduct is based upon their lack of union membership. See, *e.g., N.L.R.B. v. Local 80, Plumbers,* 339 F.2d 728, 735 (C.A.D.C., 1964). This is so because "the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term, or condition of employment." *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667, 676 (1961).[4]

In the instant case, the Board found that, in fact, the Union unlawfully limited the employment opportunities of job applicants Anthony DiMella and Victor Bartolucci at various times from February to August 1973, because of their lack of Union membership. The Union admitted that DiMella and Bartolucci were denied referrals during this period but contended this was only because they did not have the 5 years trade experience, assertedly required by the contract and thus were ineligible for referral since applicants with such experience were available. We show below that the Board properly found that the Union's "true purpose" or "real motive" for its refusal to refer DiMella and Bartolucci was that they were not Union members.

Thus, it is uncontested that neither DiMella nor Bartolucci were members of the Union at any time during or prior to 1973. It is also undisputed, as the record shows, that from August 1969 to January 5, 1973, Bartolucci and DiMella periodically applied to Union business manager Impellitteri, who operated the Unions exclusive hiring hall, for job referrals as pipefitters. The record further shows that during this time period they did obtain referrals from Impellitteri as "permit men" (*i.e.*, nonmembers) to various area contractors as journeymen pipefitters, but only

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[4] The Board did not find an independent violation of Section 8(b)(2) of the Act founded upon the Union's discriminatory refusal to refer these two applicants because such a violation was not alleged or argued (A. 6 n. 2, 272-273).

when "book men" (*i.e.*, journeyman members of the Union or other United Associatic 'ocals) were not also available for referrals (*supra*, pp. 6-7). However, after January 5 and continuing throughout 1973, such job referrals ceased altogether because as the responsible Union official, Impellitteri, told the two applicants, "book men" were "out", and he was under "more and more" pressure from other United Association business agents to refer their members to employment within the Union's work jurisdiction (*supra*, pp. 6-7).[5] These statements themselves establish that, at least with respect to these two applicants, the Union was actually preferring current members of the Union over non-members and thus the operative criterion for immediate job referral was Union membership which the Union denied to these applicants. This is so because the testimony of Union assistant Business Manager Quinn unqualifiedly defines a "book man" as "a paid up member of the local" (A. 242). And both Quinn and Impellitteri revealed that a "union book" is both a means of ascertaining membership in the Union or other locals and a method for determining "qualifications" for job referral (A. 269-270, 211-212). At least

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[5] These factual findings of the Board rest upon the credited testimony of Bartolucci and DiMella as to what Impellitteri told them each time he refused them job referrals. The Judge, based "upon the entire record . . . including [his] observation of the demeanor of the witnesses while testifying . . ." (A. 12), discredited Impellitteri's testimony that he invariably used the term "qualified men" and did not mention "book men." The Board "carefully examined the record and [found] no basis for reversing [the Judge's credibility] findings" (A. 3 n. 1). This credibility resolution was reasonable, for Impellitteri first testified that he did not say anything about "qualified"; rather, "all" he said was "at the present time, I don't have any [work]" (A. 64). Impellitteri, later testified that he told them "qualified men were out of work" (A. 64-65, 208-209). Impellitteri later admitted (A. 209), as the Judge noted (A. 12 n. 7), that "book men" and "qualified men" mean the same thing. Thus, whatever Impellitteri claims he said, it was synonymous with the term "book men." And Impellitteri did not deny that other business agents were inquiring about available job referrals (A. 205-207). Accordingly, there are no "extraordinary circumstances" which require rejection of the Judge's ruling. See *N.L.R.B. v. Local 3, Elec. Wkrs*, 362 F.2d 232, 235 (C.A. 2, 1966).

within the Union's work jurisdiction then, the term "book man" was understood by responsible officials of the Union to identify a Union member. Thus, the statements made by Impellitteri at the time he denied referrals to these two applicants establish beyond question that "[t]his is one of those rare cases in which there has been 'an outright confession of unlawful discrimination.'" *N.L.R.B. v. John Langenbacher Co.*, 398 F.2d 459, 463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049, quoting *N.L.R.B. v. Ferguson*, 257 F.2d 88, 92 (C.A. 5, 1958). Accordingly, the Board was fully warranted in concluding that (A. 17-18): "at least so far as Bartolucci and DiMella were concerned, union membership was since January 5, 1973, a condition precedent to referral to a job through the Union's hiring hall."[6]

Before the Board the Union claimed that any discrimination in referrals was based on the established competence of "book men", not on Union membership, and that Bartolucci and DiMella were not "qualified" for referral because they did not have the contractually imposed 5 years experience in the plumbing or heating trade. Even assuming *arguendo* that these are legitimate reasons for denying referrals, such explanations are no defense where, as we have shown, the Union's conduct was motivated if not wholly at least in part by the two applicant's lack of current membership in the Union. See *N.L.R.B. v. Teamsters, Local 282*, 412 F.

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[6] Before the Board the Union contended that the Board's own holding in *Amalgamated Meat Cutters, Local 576*, 201 NLRB 922 (1973) prevented the Judge from relying upon Impellitteri's "book men" statements to show an unlawful job referral preference. The Board reached no such decision in that case. The Judge's disinclination there to consider the use of the words "members" or "Union members" by union officials as background evidence of an unlawful preference was not subject to exception by any party. Thus, these comments were not before the Board. And the Board expressly affirmed the Judge's unfair labor practice finding on other evidence. 201 NLRB at 922 n. 2. Thus, assuming the Judge stated a broad rule applicable to all future cases, his recommended decision does not represent the Board's position.

2d 334 (C.A. 2, 1969), cert. denied, 396 U.S. 1038. Moreover, these asserted justifications further support the Board's unfair labor practice finding because as the Board found (A. 17) they were "seized upon in this case to obscure the true purpose of [the Union's] conduct."

The actual operation of the exclusive hiring hall belies the validity of the Union's explanations for its conduct. The referral histories of these two applicants demonstrate that the Union's contractual obligation to refer and the contractors' obligation to employ "only qualified plumbers and steamfitters" was not understood or interpreted by the parties to mean that only applicants with five years experience in the pipefitting industry were eligible for referral. The fact is, as the Board found (A. 17), both DeMella and Bartolucci were referred by the Union and accepted by each of various contractors for employment as journeyman pipefitters at journeymen rates of pay. There is no evidence that any Union official told them at any time that their referrals were dependent upon availability of unskilled jobs. As General Piping Foreman Anthony Polcaro testified, he was not concerned with the contract or any other requirement. Rather, he assumed that men referred to his jobs by the Union were competent unless they later proved otherwise (A. 107-108). Impellitteri admitted that he did not necessarily follow the contract in making referrals. Rather, he was normally willing to give applicants "the benefit of the doubt and [would] dispatch the people. It's up to them to hold the job" (A. 226-227). Thus, this testimony plus the fact that Impellitteri referred these two applicants during a 3½ year period prior to 1973 discredits the Union's claim that their lack of five years experience is a valid basis for denying them referrals during 1973. To be sure Section 8(f)(4) of the Act[7] permits experience qualification provisions;

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[7] Section 8(f)(4) provides in pertinent part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement

(continued)

however, the Union is not at liberty to waive and then to resurrect such a contractual requirement at its discretion. As the Third Circuit has observed: "[Section 8(f)(4)] does not sanction the use of seemingly objective criteria as a guise for achieving illegal discrimination." *N.L.R.B. v. Local 269, IBEW*, 357 F.2d 51, 57 (1966). See also, *Int. Photographers, etc., Local 659*, 197 NLRB 1187, 1190 (1972), enf'd., 477 F.2d 450 (C.A.D.C., 1973), cert. denied, 414 U.S. 1157.

During the hearing Impellitteri attempted to create the impression that DiMella and Bartolucci were not qualified for any of the jobs available after January 5, 1973 (A. 224-225; 214-215). However, as the Board found (A. 17), Impellitteri did not inform DiMella and Bartolucci that this was the reason for his refsual to honor their requests for work. What he told them was that it was because "book men" are out of work, and he was under "more and more pressure" from other business agents to refer their members. Accordingly, this belated "reason" which was never communicated to the applicants at the time they were denied employment cannot now be relied upon to buttress the Union's position. See *N.L.R.B. v. Sawyer Downtown Motors, Inc.*, 213 F.2d 514, 516 (C.A. 7, 1954). Moreover, Impellitteri admitted that he was not familiar with the type of work these applicants had actually performed on the various jobsites (A. 62-63, 223), and he further stated that what they did on the job was up to the contractor (A. 42, 63, 67). In short, Impellitteri never

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[7] (continued)

> . . . with a labor organization . . . because . . . (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length or service with such employer, in the industry or in the particular geographic area: Provided, that nothing in this subsection shall set aside the final provision to Section 8(a)(3) of the Act . . .

determined their journeyman qualifications either by examination, consultation with the several contractors they had worked for, or by any other objective basis. Compare *N.L.R.B. v. News Syndicate Co.*, 365 U.S. 695 (1961). The Union's failure at the time to make this determination renders this assertion unpersuasive now. *N.L.R.B. v. Local 2, Plumbers*, 360 F.2d 428, 434 (C.A. 2, 1966).

In an effort to corroborate Impellitteri, Assistant Business Agent Quinn asserted that in his opinion "we would have problems in keeping [Bartolucci and DiMella] on the job with a contractor" because "the contractor wants a fully qualified man" (A. 237). Quinn admitted however, that he was "not too familiar with Mr. Bartolucci and DiMella" (A. 237), that he knew nothing about their qualification based upon personal observation or experience, and that it was at the hearing in this case when he learned "more about [them] . . . than I ever knew before" (A. 186). This conclusionary testimony from a Union official, who admitted possessing no basis for such an opinion, is itself flatly contradicted by the uncontested fact that DiMella and Bartolucci "held" every job to which they were referred, and were only laid off for lack of work. Indeed, Impellitteri conceded that he had no complaints about the applicants from any of the contractors to whom they were referred (*supra*, p. 8).[8] Since the Union never made any impersonal resolution of the applicants' qualifications or actual premised its referral refusals upon their qualifications, it follows that the Board (A. 17 n. 15) properly found it unnecessary to make any findings about their "qualifications". No such finding was necessary because "whatever the relevancy of this matter to the issue of relief, it did not meet the strict charge of liability under . . . Section 8(b)

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[8] Quinn offered hearsay testimony that Hartford Electric Co. did not want DiMella back (A. 259), but admitted he did not know the reason (A. 260). Such testimony is unreliable because: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 230 (1938).

(1)(A) for coercing employees in the exercise of their Section 7 rights." *N.L.R.B. v. Local 2 Plumbers, supra,* 360 F.2d at 434.

In light of the Union's unsubstantiated reasons for its conduct coupled with Impellitteri's admission that Bartolucci and DiMella were denied referrals because Union members were also available for work, the Board was fully warranted in concluding on this record that the Union unlawfully limited their employment because of their lack of Union membership.

II. THE BOARD'S REMEDIAL ORDER IS PROPER

Section 10(c) of the Act broadly empowers the Board to require violators "to take such affirmative action . . . as will effectuate the policies of this Act." One fundamental policy of the Act is "to allow employees to freely exercise their right to . . abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954). Applicants for jobs in the construction industry who are denied referrals because of lack of union membership suffer more than other discriminatees because their employment is usually of short duration and generally subject to seasonal and economic fluctuations. See *Daniel Const. Co.*, 167 NLRB 1078, 1079 (1967); U.S. Dept. of Labor, Labor Management Services Admin., *Exclusive Union Work Referral System in the Building Trades* (G.P.O. 1970). Here, the Board recognized that the Union's unlawful denial of employment to applicants DiMella and Bartolucci "go[es] to the very heart of the Act" (A. 20, 3). Accordingly, the Board ordered the Union to "cease and desist from . . . in any other manner restraining or coercing employees or applicants for employment in the exercise of rights guaranteed by Section 7 of the Act" (A. 21). This order requires the Union to post a notice stating,

inter alia, that: "WE WILL NOT in any other manner restrain or coerce any employee or applicant for employment through the exclusive hiring hall we operate, in the exercise of rights guaranteed them by Section 7 of the Act" (A. 4, 24). The language of the cease and desist order and corresponding notice read together prevents the Union from operating its exclusive hiring hall in a discriminatory manner. The order simply protects other job applicants from unlawful discrimination in job referrals for whatever reason the Union may seize upon. Orders so drafted have been expressly approved by the Supreme Court,[9] and there is ample warrant for this protection here because all New London area applicants are solely dependent upon the Union's exclusive hiring hall for jobs. As the Eighth Circuit recognized in *N.L.R.B. v. Mansion House Corp.*, 473 F.2d 471, 472 (1973), judicial intervention is essential if non-members are to be accorded employment preference equal to that of union members. See also, Reich, "The New Property," 73 Yale L.J. 733, 738 (1964). In sum, the Board's cease and desist order is firmly based upon the particular circumstances of this case and is well within the Board's remedial discretion since it "bears some resemblance to that [violation] which the [Union] has committed . . . ." *N.L.R.B. v. Express Publish. Co., supra,* 312 U.S. at 437.

Before the Board the Union also objected to those portions of the remedial order which provide backpay to the two discriminatees and which require the Union to maintain records of its hiring and referral operations.

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[9] See *N.L.R.B. v. Express Publish. Co., supra,* 312 U.S. 426, 438 (1941); *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386-393 (1945). *Communication Wkrs., et al. v. N.L.R.B.*, 362 U.S. 479 (1960) is not to the contrary. There, the union unlawfully coerced strikebreakers and did not, as here, foreclose employment entirely. See 120 NLRB 684 (1958). Compare *N.L.R.B. v. Standard Oil Co.*, 138 F.2d 885, 889 (C.A. 2, 1943) (concurring opinion of Clark, C.J.) and cases cited therein.

With respect to the first objection the Union argues that there is no evidence any jobs were available after January 1973, which DiMella and Bartolucci were "competent" to perform. The Union's assertion with respect to the record is contradicted by Impellitteri's testimony that during 1973, "maybe you get a little lapse period where you pick up a few hands, ten or twelve hands" (A. 224, 225). Since Impellitteri considered DiMella and Bartolucci "hands", this testimony at least suggests that they would have obtained some referrals during 1973. In any event, a backpay order against the Union is fully warranted here because it was the Union which "caused the [job applicants] to be placed in the position where [they] would be subject to such loss." *N.L.R.B. v. Local 333, U.M.D.*, 417 F.2d 865, 868 (C.A. 2, 1969), cert. denied, 397 U.S. 1008. And resolution of any conflict as to whether the Union actually owes any backpay is, as the Board noted (A. 20), a matter for the compliance stage of this proceeding. See, *e.g.*, *N.L.R.B. v. N.Y. Merchandise Co.*, 134 F.2d 949 (C.A. 2, 1943).

With respect to its second objection, the Union urges that such a requirement is barred because the Board did not find, as the General Counsel had alleged, that the Union's failure to maintain adequate records was an independent violation of Section 8(b)(1)(A) of the Act. The Board did find, however, that the Unions' "records were plainly inadequate" (A. 18 n. 16). The Union did not offer any records into evidence at the hearing. The only referral list in evidence was produced in response to the General Counsel's subpoena (A. 44-45; 280-283) This list covers only 1973, although the hiring hall has been operated at least since October 28, 1966 (A. 8 n. 5). The 1973 referral list does not accurately reflect the total number of applicants who sought employment from the Union during 1973 and omits the critical information as to when those listed were actually referred (A. 18-19 n. 16; 280-283, 241, 255-256, 260-264).

The absence of records has enabled the Union to operate its hiring hall without accountability and thereby facilitates its ability to preserve job preference for local Union members and members of other sister locals. In these circumstances, the Board properly required the Union to maintain adequate referral records for the limited purpose of creating an objective basis for determining compliance with the Board's order requiring the Union to cease denying referrals to applicants because of their lack of membership in the Union. Accord: *Op. Engins., Local 138, et al. v. N.L.R.B.*, 321 F.2d 130, 138 (C.A. 2, 1963); *Ironwkrs. Local 290 (Mid-States Steel Erection Co.)*, 184 NLRB 177 (1970), en'fd in relevant part, 443 F.2d 383 (C.A. 6, 1971).[10]

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[10] The Union filed no exceptions to the Judge's recommended remedy with respect to those portions of the order requiring it to post notices and mail a sufficient number for posting by willing employers party to the Union's collective bargaining agreement. Accordingly, the Union is barred from raising this objection for the first time in this Court. Section 10(e) of the Act; *N.L.R.B. v. Dist. 50 U.M.W.*, 355 U.S. 453, 463-464 (1958). In any event, such an order is essential if employers as well as job applicants are to know that the Union does not determine referrals on the basis of current Union membership. See *N.L.R.B. v. Falk*, 308 U.S. 453, 462 (1940).

CONCLUSION

For the reasons stated, the Board respectfully submits that the application for enforcement should be granted and that a decree should issue enforcing the Board's order in full.

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April, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. LOCAL UNION NO. 305, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, Respondent.	)	No. 74-2176

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 16th day of April, 1975.